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No. 88-1945

In the Supreme Court of the United States

OCTOBER TERM, 1989

ATLAS PAPER BOX COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTION PRESENTED

Whether, in a Title VII disparate impact case, an employer may defend an intelligence test used for employee selection as job-related without conducting a separate formal validation study of the test in the employer's own business.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 868 F.2d 1487. The opinion of the district court (Pet. App. 38-57) is reported at 680 F. Supp. 1184.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1989. Pet. App. 58. A petition for rehearing was denied on April 4, 1989. Pet. App. 59. The petition for a writ of certiorari was filed on June 2, 1989. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission brought suit against Atlas Paper Box Company in May 1983 alleging that the company's failure to hire blacks as office and clerical employees from 1969 to 1984 violated

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission sought to establish liability under both the disparate impact and disparate treatment theories of discrimination. In particular, it challenged petitioner's use of the Wonderlic Personnel Test, the same intelligence test that was at issue in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

1. After trial, the district court entered a memorandum opinion setting forth its findings of fact and conclusions of law. Pet. App. 38-57. The court noted that petitioner's "clerical staff numbers from 25 to 30 workers" (*id.* at 39) and that from 1969 to 1984 petitioner hired 121 clerical workers (*id.* at 46). The court found, however, that "[a]lthough there are many blacks employed in the plant, Atlas has never had a black person working in its office." *Id.* at 39. Although 63 blacks applied for clerical jobs during the period, none were hired; petitioner made all of its 121 clerical hires for its office from the pool of 828 white applicants. See *id.* at 46.

The court found that petitioner began to use the Wonderlic Personnel Test in the selection of its clerical employees in 1969. The company "did some unsystematic experimentation with the test, trying it out on management, family members and employees in the clerical staff whose relative performance was already known," but it did not in any way formally attempt to verify that the test would predict successful job performance for any of the positions in petitioner's office. Pet. App. 41. Moreover, although the test's publisher recommended use of different scores for different clerical positions (secretaries, typists, file clerks, telephone operators), petitioner decided to use the highest of the recommended scores (25) as the passing score, without regard to what tasks different employees would actually perform. *Id.* at 41-42. Even so, of the 121

hires, 29 (or 24%) actually had scores less than the passing score. *Id.* at 46. Furthermore, the court pointed out, "[t]here was some evidence that the test was administered in a biased fashion" (*id.* at 42): petitioner did not make the adjustment recommended by the test's devisers to eliminate possible cultural bias; for black applicants, petitioner did not make recommended score adjustments for age, while it did make such adjustments for white applicants; and some of the persons actually hired (all of whom were white) were not required to take the test until after they were hired or were permitted to take the test more than once. *Id.* at 40, 42-43, 46. See also *id.* at 2 n.2 ("a number of white applicants were given more than one chance to take or pass the test").[1]

Notwithstanding the foregoing findings, the district court, based on its review of petitioner's hires and applicants and their test scores (on a year-by-year basis), concluded that there was no disparate treatment in petitioner's 1969-1984 clerical office hirings. Pet. App. 47-55.[2] With respect to the disparate impact claim, the court, having stated that it was "extremely difficult to make any sense out of the evidence on the issue of adverse impact" (*id.* at 45), found that the Commission had made a prima facie case of "statistically significant adverse impact on black applicants at least before 1978, although apparently

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[1] In fact, 58 of the 121 whites hired (48%) either failed to score the supposed minimum on the test, never took it, or took it after being hired. 1 C.A. App. 176-178.

[2] The court found no "racially discriminatory pattern or practice" (Pet. App. 55) even though its analysis showed that there were black applicants with Wonderlic scores greater than or equal to those of whites hired in seven years (1970, 1971, 1973, 1975, 1977, 1978, 1980) and that in four additional years petitioner failed to test either the rejected black applicants (1974, 1983) or the whites who were hired (1979, 1982). *Id.* at 47-54.

not in recent years" (*id.* at 55-56). Nevertheless, the court found that petitioner had carried its burden "to show that the use of the test is job related." *Id.* at 56.

In so finding, the court, like petitioner, relied on the testimony of Dr. John Hunter that the Wonderlic test "is a valid test for all types of clerical work." Pet. App. 44. That testimony was sufficient, the court concluded, even though "no formal validation study was performed at [petitioner's business] itself," because "any attempt to validate the Wonderlic test on a clerical workforce as small as the one at Atlas would have been statistically meaningless." *Id.* at 56. Finally, the court concluded that petitioner did not use the Wonderlic test as a pretext for discrimination. *Id.* at 56-57.[3]

2. The court of appeals reversed and remanded for new findings of fact and conclusions of law. Pet. App. 1-7. The court recited a number of critical facts: not a single one of the 121 hires during 1969-1984 was black; 29 of the 121 whites hired did not meet the supposed passing score on the Wonderlic test; white applicants, but not black applicants, received favorable adjustments of their test scores or a chance to retake the test or were hired before taking the test; petitioner ignored the test publisher's recommendation that different minimum scores be used for different clerical positions, instead using 25 as the uniform minimum; and "all of the experts who testified in the case agreed that statistical evidence, if evaluated from 1969, when the Wonderlic test was first utilized, until 1984, the date of hearing, would reflect a significant disparate impact." *Id.* at 2, 6. The court also

[3] The court added: "A close review of the hiring decisions made over the many years at issue shows a concerted attempt to hire the most qualified employees. While there were a few black applicants who met [petitioner's] stringent standards, they were never passed over for less well qualified white applicants." Pet. App. 57.

pointed out that the district court's year-by-year survey of petitioner's hiring decisions itself showed that, during the period 1969-1984, some white applicants were hired while black applicants with equally high or higher scores were passed over, some black applicants were not tested, and some white applicants with scores less than 25 were hired. *Id.* at 3.

Based on those facts, the court of appeals disagreed with the district court's finding that the Commission had not shown "a pattern or practice of racial discrimination" (Pet. App. 3) and concluded that the Commission had made out a prima facie case of disparate impact (*id.* at 4). See also *id.* at 5 (statistical and other evidence was "relevant and material" and not "meaningless"; such evidence could indicate pretext). With respect to petitioner's effort to show the job-relatedness of the Wonderlic test through the testimony of Dr. Hunter, the court noted that, although "[t]here is no fixed or firm rule regarding criteri[a] for analyzing studies related to the cognitive ability test * * *, [t]hey must generally be evaluated by examination of 'important elements of work behavior that comprise or are relevant to the job.' " *Id.* at 4 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 431). Here, the court found it "sufficient * * * to say that no study was made at this particular * * * office by any of the experts [petitioner] presented." Pet. App. 4.

The court specifically noted that it was making "no judgment * * as to whether, in theory, the proper use of the Wonderlic test may not be demonstrated to be job related in the case of clerical hires." Pet. App. 5. But any such demonstration, the court observed, must be based on an examination of the "skills, abilities, and knowledge that are necessary for the successful performance of the job." *Ibid.* (internal quotation marks omitted). No such examination had been conducted here: Dr. Hunter "failed to

visit and inspect the * * * office and never studied the nature and content of the * * * clerical and office jobs involved." *Id.* at 6. Relying on this Court's decision in *Albermarle Paper Co.*, 422 U.S. at 432, the court of appeals added that test-validity studies of jobs at other locations could not justify use of the test for petitioner's jobs (under the so-called "validity generalization" theory) unless the two sets of jobs were sufficiently similar. No such finding could be made here: no study of the content of petitioner's jobs was undertaken and so, the court concluded, the validity generalization theory was inapplicable in this case. Pet. App. 6, 7.

The court of appeals remanded the case to the district court with instructions to consider whether the Commission had made out a prima facie case under either the disparate treatment or disparate impact theory and, then, to determine whether petitioner had advanced a valid business justification for its practices. Pet. App. 7. Judge Cook concurred in the reversal of the district court's judgment for petitioner but disagreed with the majority's remand decision. In his view, judgment should have been entered for the Commission. *Id.* at 8-37.

ARGUMENT

Petitioner contends that the court of appeals erroneously held that, under *Albemarle Paper Co.* v. *Moody, supra*, validity generalization is "illegal per se" and that a test may be used for hiring at petitioner's office only if "a separate validation study at Petitioner's place of business is conducted." Pet. 7-8; see Pet. i (question presented). Because the case does not involve the issue petitioner presents, further review by this Court is not warranted. In any event, the decision is interlocutory; the case could well be resolved on remand on other grounds, such as the disparate

treatment claim, that would moot the question on which petitioner seeks review.

The court of appeals did not, either by its own analysis or by interpretation of *Albemarle Paper Co.*, hold that validity generalization—which consists of applying the results of test-validity studies from one setting to other, similar situations—is improper per se. Nor did it hold that a specific validation study must be conducted for petitioners' office and clerical jobs before studies conducted elsewhere may be used as evidence that the Wonderlic test is job-related for purposes of a Title VII disparate impact case. Indeed, the court observed that "[t]here is no fixed or firm rule regarding criteri[a] for analyzing studies related to the cognitive ability test." Pet. App. 4. The court pointedly avoided drawing any general conclusion about the use of validity generalization. *Id.* at 6. And the court expressly noted that it was not even drawing a conclusion about the use of the Wonderlic test for clerical jobs. *Id.* at 5.

All the court held was that the validity generalization theory was not properly applied in this case, because that theory would require that petitioner's jobs be similar to the jobs involved in the relied-on validity studies, yet petitioner's expert, Dr. Hunter, "never studied the nature and content of [petitioner's] clerical and office jobs." Pet. App. 6. That ruling correctly requires job similarity to justify borrowing of validity studies (see *Albemarle Paper Co.*, 422 U.S. at 432; Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. 1607.7B(2)) and correctly indicates that job similarity cannot be determined without some study of the actual content of the jobs at issue. The decision does not indicate precisely how similar jobs must be in order to justify borrowing the results of validity studies or how detailed the study of job content must be. Moreover, contrary to petitioner's sug-

gestion (Pet. 7-12), the ruling does not purport to reject or to preempt further scientific developments regarding sound evidentiary requirements for the use of employment tests. In short, the broad legal issue petitioner asks this Court to review is not presented here.

Review of the court of appeals' decision would be inappropriate for other reasons as well. The ruling is interlocutory: the court of appeals merely remanded the case for new findings of fact and conclusions of law, and petitioner might therefore still prevail on the merits. Further, the court of appeals' rejection of the district court's application of the validity generalization theory is not dispositive even of the business-justification step in the disparate impact case, which has been left open on remand. Pet. App. 7. And on the disparate treatment claim, which also remains open on remand and as to which the court of appeals detailed extensive evidence of discrimination, the validity generalization issue, far from being dispositive, is of little if any relevance.[4] Finally, even if the

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[4] It is unnecessary to vacate the court of appeals' decision and remand the case in light of this Court's recent decision in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), that the employer has the burden of production, rather than the burden of persuasion, on the question of business justification (*id.* at 2126). The disparate impact issue might not even be reached on remand, and if it is, the issue must be analyzed under the standards set forth in *Wards Cove* in any event. Moreover, the court of appeals would not reach any different result were it to reconsider its ruling under *Wards Cove*: nothing in the court's decision suggests that it turned on which party bore the risk of nonpersuasion; and even the burden of production would require petitioner to advance evidence "sufficient to justify a judgment" for it (*Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981)), yet petitioner did not supply sufficient evidence showing that its jobs were similar to those covered by the validity studies it relied on—the crucial step in its effort to establish a business justification for the Wonderlic test.

case presented a broad legal issue concerning validity generalization and even if the issue were properly reviewable at this stage of this case, this Court's review of the issue would be premature. There is no conflict among the circuits, and the lower courts have barely addressed the issue of the effect on employers' use of screening tests of scientific developments since *Albemarle Paper Co.*[5] Any consideration of the issue by this Court should await further examination by the lower courts.

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[5] Petitioner cites (Pet. 11 n.2) *Cormier* v. *P.P.G. Industries, Inc.*, 519 F. Supp. 211 (W.D. La. 1981), aff'd, 702 F.2d 567 (5th Cir. 1983), but that case did not involve the issue of validity generalization. The only decision petitioner cites (Pet. 8-9) that does speak to an aspect of the question is the district court decision in *Pegues* v. *Mississippi State Employment Service*, 488 F. Supp. 239 (N.D. Miss. 1980), aff'd in part and rev'd in part, 699 F.2d 760 (5th Cir. 1983), cert. denied, 459 U.S. 1037 (1982), which involved the use of tests by a state employment-referral service. In the passage quoted by petitioner (Pet. 9), the *Pegues* court, while accepting Dr. Hunter's testimony (which was offered by the government) on the subject of validity generalization, merely rejects the sweeping proposition, which would defeat all validity generalization, that "validity is specific to a particular location, a particular set of tasks and to a specific applicant population" (488 F. Supp. at 254). The decision similarly rejects the argument that the mere possibility of job differences, or the existence of "small" differences, renders improper what has been called the transportability of validity studies from one context to another. *Ibid.* The court of appeals' ruling in the present case is not inconsistent with either of those conclusions, which were not addressed by the Fifth Circuit in the appeal of the district court's decision in the *Pegues* case (see 699 F.2d at 774 n.14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission

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